IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 59 OF 2004

STATE
Through Public Prosecutor,
Panaji, Goa. ..... Appellant

V e r s u s

Mr. Tony Fernandes,
Central Jail Aguada, ... Respondent

Mrs. Winnie Coutinho, Public Prosecutor for the State.

Shri Arun Bras De Sa, Advocate for the Respondent/Accused.

Coram:- N. A. BRITTO, J.

Date:- 4th August, 2006

ORAL JUDGMENT

This is State's appeal for enhancement of sentence under Section 376 I.P.C. The accused at the relevant time was 50 years of age while the age of the victim has been held to be 13 years, 8 months. It appears that before the trial Court, on behalf of the State, it was submitted that maximum punishment should be awarded to the accused and in answer to that, it was contended on behalf of the accused, that there was no past

record of the accused and the accused had also wife and minor children residing with him in a rented house and in case harsh punishment is imposed, the family of the accused would be thrown on the road. It was further contended on behalf of the accused, that this was a fit case to award sentence of less than seven years.

2. The learned trial Court took note of Section 376(1) I.P.C. and observed that it provided punishment with imprisonment of either description of a term which should not be less than seven years but which could be for life or for a term which may extend to ten years and also fine. The learned trial Court also took note of the proviso below sub-section (1) of Section 376 and observed that sentence below seven years would be imposed only in case there were adequate and special reasons. The learned trial Court also took note of the respective ages of the accused and the victim and noted that there was nothing on record to suggest that the victim had a history of any bad moral and further noted that a person of 50 years, who indulged in rape, possessed a sick mind which would not entitle him for leniency and considering that the accused had a wife and two young children who had otherwise no support, the accused being the only earning member of the family and as the accused had no past record, the learned

trial Court found that this is not a fit case to impose punishment for life or for a term of ten years and looking at all the circumstances, the minimum prescribed, namely of seven years would be adequate and reasonable.

3. All that which has been stated in the Memorandum of appeal is that the sentence of seven years R.I. and fine of Rs.5,000/- for an offence of rape is ridiculously low and is not commensurate with the gravity of the crime. On behalf of the accused, reliance has been placed on the case of ***Tulshidas Kanolkar v. State of Goa ((2003) 8 SCC 590)***. That was a case where the accused was tried under Section 376 and 506(ii) IPC and the trial Court had imposed sentence of ten years and one year respectively with fines of Rs.10,000/- and Rs.2,000/- with default stipulation. The sentence imposed by the trial Court was reduced by this court to seven years in relation to Section 376 I.P.C. and it was argued before the Supreme Court that considering the nature of evidence and the gravity of the offence, this Court had rather acted liberally in reducing the sentence while upholding the conviction. The Hon'ble Supreme Court chose not to interfere either with the conviction or the reduction of sentence, as reduced by this Court and the final observations made by the Hon'ble Supreme Court are with reference to a mentally challenged deficient woman and the Supreme Court

observed that the legislature would do well in prescribing higher minimum sentence in a case of that nature since gravity of offence in such cases is more serious than categories enumerated in sub-section (2) of Section 376.

4. As can be seen from sub-section(1) of Section 376 and except the cases provided by sub-section (2), the punishment provided for an offence of rape could be for life or for term which may extend to ten years but which shall not be less than seven years and which in terms of the proviso would be less than seven years if there are adequate and special reasons, which are required to be mentioned in the Judgment. The cases covered by sub-section (2) of Section 376 are made punishable with imprisonment which shall be not less than ten years but which may also be for life. It is nobody's case that the case at hand was covered by clause (f) of sub-Section (2) of Section 376 I.P.C. since the age of the victim is more than thirteen years. From the observations of the learned trial Court, it does appear that learned trial court has taken into consideration the gravity of the offence as well as the antecedents of the accused. It is often said that sentence to be imposed should be adequate in relation to the crime or in other words, it should be proportional and, for this, the Courts are certainly required to look into the aggravating and mitigating circumstances. Again the imposing

of the said sentence in the given case is a matter of discretion, a discretion which has to be exercised judicially by taking into account aggravating and mitigating circumstances. As stated in ***Dennis Councle McGautha v. State of California***, there is no formula of a foolproof nature which is possible and which would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. The Supreme Court after making reference to the said observation in ***Dennis Councle McGautha v. State of California***, in ***Shailesh Jasvantbhai v. State of Gujarat (2006) 2 SCC 359***,observed that in the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of the crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished. In ***Dhananjoy Chatterjee v. State of W.B.(1994) 2 SCC 220,*** it has been observed that the imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the

society at large while considering the imposition of appropriate punishment. The Supreme Court also referred to some other cases and observed that the punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal." If imposition of sentence is a matter of discretion of the trial Court and the same is to be exercised by balancing the aggravating and mitigating circumstances, in my view, this effort has been made by the learned Trial Judge, before he proceeded to impose the minimum sentence of seven years R.I. It cannot be said that the discretion exercised by the learned trial Court is arbitrary or capricious considering the facts of the case and that being the position, in my view, no case of enhancement for sentence is made out on the specious ground that the sentence imposed was not commensurate with the gravity of the crime. This Court will interfere only in cases where the exercise of discretion is shown to be arbitrary or capricious, on the part of trial Court.

5. Considering the above, this is not a fit case for interference, against imposition of sentence.

6. Appeal is hereby dismissed.

N. A. BRITTO, J.

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